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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.....

B. C. SCHRAM, Receiver of First National Bank-Detroit, a National Banking Association,

Petitioner,

vs.

JOSEPH L. COYNE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, B. C. Schram, Receiver of First National Bank-Detroit, a National Banking Association, respectfully represents unto the Court as follows:

SUMMARY STATEMENT

B. C. Schram, petitioner herein, is the duly qualified and acting Receiver of the First National Bank-Detroit, an insolvent national banking association, whose affairs are being wound up under the direction of the Comptroller of the Currency of the United States (R. 24-25). In the exercise of the duties imposed upon him by the National Banking Act, the petitioner filed this action in the United States District Court for the Eastern Dis-

trict of Michigan to recover a judgment against the defendant upon a note, indenture of mortgage and mortgage assumption covenant.

The case was tried in the District Court upon an agreed stipulation of facts (R. 22-34). As set forth therein, one Adolph Deutsch and his wife, on August 10, 1926, executed and delivered a promissory note and a mortgage securing the same to a bank in Detroit, whose assets were subsequently transferred to First National Bank-Detroit. Over their signatures and seals, the Deutsches in the mortgage expressly covenanted to "pay to the said mortgagee, its successors, legal representatives and assigns, the said sum of Twenty-five Hundred Dollars ($2,500.00) with interest" (R. 16). The mortgage further provided that the covenants contained therein, including this covenant to pay the principal sum and interest, "shall run with the land" (R. 18).

Less than two months later, the Deutsches conveyed the mortgaged property by warranty deed dated September 13, 1926, to the respondent herein, Joseph L. Coyne (R. 23). The deed was properly recorded and conveyed the premises with the warranty that said premises were **"free from all encumbrances whatever, except a mortgage of Twenty-five Hundred Dollars ($2,500.00) to the American State Bank, a Michigan corporation, which party of the second part assumes and agrees to pay according to its terms and stipulations"** (R. 11-12). The deed was signed and sealed by the Deutsches. Coyne did not sign either the original note or mortgage executed by the Deutsches or the warranty deed, but it was stipulated below that he did accept delivery of said deed (R. 23).

Payments on principal and interest were made from time to time, the last voluntary payment being made by

Coyne on July 28, 1932 (R. 24). Coyne having defaulted, the mortgage was foreclosed by advertisement pursuant to the power of sale contained in the mortgage (R. 23). The premises were sold on September 5, 1935, and the proceeds thereof credited on the amounts due under the terms of the note and the covenants in the mortgage, leaving a deficiency due on the principal and interest of Five Hundred Five and 35/100 Dollars ($505.35) as of the date of sale (R. 23-24). Subsequently the petitioner filed this action against Coyne to collect the deficiency due upon the note and mortgage. The respondent filed an answer setting forth a number of defenses, all of which, with the exception of the plea of the statute of limitations, were brushed aside by the District Court (R. 35).

The action below was commenced more than six but less than ten years after the last voluntary payment made by Coyne pursuant to his assumption of the mortgage (R. 24). The real and only question in the case was whether the action brought by the petitioner was barred by the six year Michigan statute of limitations relating to simple contracts or by the ten year Michigan statute of limitations relating to covenants.

The District Court held that the six year statute of limitations applied and dismissed the petitioner's complaint on November 20, 1940 (R. 39). Upon appeal the United States Circuit Court of Appeals for the Sixth Circuit affirmed the decision of the trial court (R. 45).

OPINIONS BELOW

The District Court filed a written opinion on November 14, 1940, which is unreported (R. 34-38). The Sixth Circuit Court of Appeals handed down a written opinion on April 15, 1942 (R. 46), reported in 127 Fed. (2d) 205.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered April 15, 1942 (R. 45).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 U.S.C., Section 347).

THE QUESTIONS PRESENTED

1. Is an action at law brought in Michigan to collect a mortgage deficiency from the mortgagor's grantee, who assumed and agreed in the deed of conveyance to pay the mortgage debt and to assume the covenants in said mortgage, an action upon a covenant or an action upon a simple contract?

2. If the question presented is purely one of local Michigan law, and there is no applicable Michigan statute and no controlling Michigan decision covering the point raised, shall the Federal Court sitting in Michigan decide this question, or shall it refer it for decision to the state courts of Michigan?

REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI

1. The Sixth Circuit Court of Appeals specifically held that the single question of law presented in this case had not been decided by the Michigan courts (R. 46). Under these circumstances, it was the duty of the Court of Appeals under the decisions of this Court, not to attempt to apply what it considered to be the general weight of authority, but to refer this question of law for determination to the state courts of Michigan. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), and *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941).

2. The application of the decision of the Court of Appeals is not limited to the rather small amount involved in this case. It will affect hundreds of similar claims held by the petitioner as Receiver of First National Bank-Detroit as well as numerous suits involving similar claims brought by the petitioner and presently pending in the District court in Detroit. Since the Federal Courts are controlled by the decisions of State Courts in matters of local law such as is here involved *(Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938)), the rights and interests of the creditors and shareholders of the First National Bank-Detroit and of other national bank receiverships in Michigan would be seriously prejudiced by this decision, should the Michigan courts subsequently decide the specific question of local law involved herein contrary to that of the Court of Appeals.

3. The decision of the Sixth Circuit Court of Appeals is directly contrary to the available Michigan decisions bearing upon the point at issue.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of the proceedings in case No. 8968, entitled on its docket "B. C. Schram, Receiver of First National Bank-Detroit, a National Banking Association v. Joseph L. Coyne", and that the judgment of said Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your

petitioner may have such other and further relief in the premises as this Honorable Court may seem meet.

And your petitioner will ever pray.

ROBERT S. MARX
FRANK E. WOOD
Attorneys for Petitioner

GEORGE P. BARSE,
Attorney for the Comptroller of the Currency
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.....

B. C. SCHRAM, Receiver of First National Bank-Detroit, a National Banking Association,

Petitioner,

vs.

JOSEPH L. COYNE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

Opinions below have been described in the petition for writ of certiorari under the caption "Opinions Below."

II.

JURISDICTION

The statement as to jurisdiction has heretofore been set forth in the petition for writ of certiorari under the caption "Jurisdiction."

III.

STATEMENT OF THE CASE

The facts have been adequately stated in the petition for writ of certiorari under the caption "Summary Statement."

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the District Court.

2. The Circuit Court of Appeals erred in not referring to the state courts of Michigan for determination the single question of law involved as to whether the respondent's assumption of the mortgage debt constitutes a liability under a covenant or upon a simple contract.

V.

SUMMARY OF ARGUMENT

A. When a question of local law is raised in the Federal courts, which is undecided by decisions of, and not controlled by statutes of the state wherein the suit is filed, it is the duty of the Federal courts to refer such a problem for determination to the State courts.

B. Under the available Michigan decisions and statutes, an action at law brought to collect a mortgage deficiency from the mortgagor's grantee, who assumed the covenant to pay contained in the mortgage, is barred in ten years and not in six years.

ARGUMENT

A

WHEN A QUESTION OF LOCAL LAW IS RAISED IN THE FEDERAL COURTS, WHICH IS UNDECIDED BY DECISIONS OF, AND NOT CONTROLLED BY STATUTES OF THE STATE WHEREIN THE SUIT IS FILED, IT IS THE DUTY OF THE FEDERAL COURT TO REFER SUCH A PROBLEM FOR DETERMINATION TO THE STATE COURTS.

This is a simple case presenting a single issue of law. The facts were stipulated and are not in dispute. The sole question involved is whether the six or the ten year statute of limitations of Michigan applies to the petitioner's complaint. If the six year statute applies, then the District Court and the Court of Appeals were correct in their decisions dismissing the petitioner's complaint; if the ten year statute applies, the lower courts were in error and the petitioner should recover.

Whether the six year or the ten year statute of limitations applies, rests in turn upon the basic question of whether the liability of the respondent herein sounds in simple contract or in covenant. The Court of Appeals in its decision held in the following language that this basic question was open and undecided by the Michigan courts:

> "Whether acceptance by a grantee of a deed from a mortgagor containing the grantee's assumption of the mortgage, renders the grantee liable to the mortgagee on the covenant or simple contract, is a question that has not been decided by the Michigan courts." (R. 46).

The Court of Appeals in its opinion then considered at length the decisions of the courts of other states bearing upon this point of law. There is concededly a wide split in the authorities bearing thereon. The Court of Appeals chose to follow the courts of those states which have held that the liability of a grantee under circumstances similar to those of the respondent is based upon simple contract and not upon covenant. In so deciding, the Court of Appeals stated:

> "With this latter view, we are in accord persuaded by strength of authority of its support in reason and precedent" (R. 53).

It is the petitioner's contention, as will be set forth in Section B of this brief, that the available Michigan authorities support the petitioner's contention that the respondent's liability sounds in covenant and is governed by the Michigan ten year statute of limitations. Be that as it may, the petitioner contends that if the Court of Appeals reached the conclusion that the point at issue herein had not been decided by the courts of Michigan, it was the duty of the Court of Appeals not to attempt to determine what was the general weight of authority in other states and then follow that weight of authority, but to refer the open point of law for decision to the state courts of Michigan.

A similar situation has twice been before this court recently, in both of which instances, although this court did not question the jurisdiction of the lower Federal Courts over the controversies before them, said courts were ordered to refer the undetermined local issues to the state courts for decision.

The first of these decisions is that of *Thompson v. Magnolia Petroleum Company,* 309 U.S. 478 (1940). A question arose therein as to whether a right of way in Illinois conveyed a fee simple title or a mere easement to the owner thereof. The Seventh Circuit Court of Appeals held that the same conveyed a fee simple title while the Eight Circuit Court of Appeals held that the right of way conveyed an easement. There was no applicable Illinois statute or decision construing the right of way estate in Illinois. This Court, while conceding that the Federal Court had jurisdiction over the dispute before it, remanded the case to the District Court "with instructions to modify its order so as to provide appropriate submission of the question of fee simple ownership of the right of way to the Illinois state court." 309 U.S. 484.

In the next case of *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941), a suit was brought in the District Court of Texas to enjoin the enforcement of an order of the Railroad Commission of Texas. The Commission based its order upon a Texas statute which statute had not been interpreted by the state courts of Texas. Here again, upon the case ultimately reaching this Court, this Court ordered the cause remanded to the District Court "with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion". 312 U.S. 501.

In reaching this decision, this Court used the following language directly applicable to the within situation:

> "Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our

> independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experience circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. **But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination.** The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. **In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication."**

To the same effect, see the very recent decision of this Court in the case of *City of Chicago v. Fieldcrest Dairies, Inc.*, decided April 27, 1942, and reported in 86 Law. Ed. Adv. Op. Page 888, as well as a very recent case from the Sixth Circuit Court of Appeals decided subsequent to the within case, to-wit, *Findley v. Odland,* 127 Fed. (2d) 948 at 953.

The petitioner urges that under the clear mandate of this court, as set forth in the cases cited hereinabove, it was the duty of the Court of Appeals, having decided that there were no controlling Michigan authorities covering the point of law involved herein, to remand the case to the District Court with instructions to submit the issue of law for decision to the state courts of Michigan. Your petitioner, as Receiver of the First National Bank-

Detroit, holds among his assets hundreds of claims similar to that involved herein. Should the state courts of Michigan ultimately decide this issue of local law contrary to that of the Court of Appeals herein, the hopeless confusion in which your petitioner, as well as innumerable other holders of similar claims, would find themselves, is most apparent.

Obvious, too, is the discrimination that would obtain as between persons similarly situated to the respondent herein who were sued in the Federal as opposed to the state courts. Petitioner, therefore, contends that the Court of Appeals erred in not remanding the question of law involved herein for determination in the state courts of Michigan, and that this Court should grant certiorari for so doing.

B

UNDER THE AVAILABLE MICHIGAN DECISIONS AND STATUTES, AN ACTION AT LAW BROUGHT TO COLLECT A MORTGAGE DEFICIENCY FROM THE MORTGAGOR'S GRANTEE, WHO ASSUMED THE COVENANT TO PAY CONTAINED IN THE MORTGAGE, IS BARRED IN TEN YEARS AND NOT IN SIX YEARS.

As above stated, the Court of Appeals held in its opinion that issue of local law involved herein had not been decided by the Michigan courts. The petitioner concedes that this is true, but contends that the available Michigan decisions all point in the direction of the liability of the respondent herein being considered in the nature of covenant, and hence barred by the Michigan ten year statute of limitations.

The merits of this case turn upon the proper construc-

tion of Section 27.605, Mich. Stat. Annot. (C.L. '29, Sec. 13976), which reads in material part as follows:

> "All actions in any of the courts of this state shall be commenced within six (6) years next after the causes of action shall accrue, and not afterward, except as hereinafter specified: *Provided, however,*
>
> "1. That actions founded upon judgments or decrees rendered in any court of record of the United States, or of this state, or of some other of the United States, and actions founded upon bonds of public officers, **actions founded upon covenants in deeds and mortgages of real estate may be brought within ten (10) years from the time of the rendition of such judgment, or the time when the cause of action accrued on such bond or covenants; . . .** "

As recently described by the Supreme Court of Michigan in the case of *Guardian Depositors Corporation v. Powers,* 296 Mich. 553, 296 N.W. 675 (1941): "A debtor, holding a real estate mortgage as security, in the event of non-payment of the debt, may have recourse to any one of four remedies:

"1. An action at law on the note.

"2. An action at law on the covenant in the mortgage. *Guardian Depositors Corp. v. Savage,* 287 Mich. 193.

"3. A foreclosure in equity with the right to a deficiency judgment in the amount fixed by the court's decree. 3 Comp. Laws 1929, Sec. 14364, Stat. Ann. Sec. 27.1132 et seq.

"4. Foreclosure by advertisement as was had in the instant case under the provisions of 3 Comp. Laws 1929, Sec. 14425, Stat. Ann. Sec. 27.1221 et seq., with a sub-

sequent right to an action for deficiency. *New York Life Ins. Co. v. Erb*, 276 Mich. 610." (296 Mich. 553, 560, 296 N.W. 675, 678.)

In the last few years there has been a series of decisions of the Supreme Court of Michigan all relating to the mortgage deficiency problem, which petitioner shall briefly consider and which have a direct bearing on the issues presented herein.

In *Guardian Depositors Corporation v. Savage*, 287 Mich. 193, 283 N.W. 26 (1938), the Supreme Court of Michigan held that the mortgagee could bring an action against the mortgagor on the covenants contained in the mortgage and recover a decree for the deficiency remaining after the application of the proceeds obtained through a chancery sale of the mortgaged property, and that such an action was governed by the ten year period of limitation.

In the case of *Guardian Depositors Corporation v. Hebb*, 290 Mich. 427, 287 N.W. 796 (1939), the Supreme Court extended the same doctrine to cover deficiencies occurring after foreclosure by advertisement proceedings and a sale under the power of sale contained in the mortgage. Here, too, the ten year statute of limitations was declared applicable to actions at law based upon the covenant to pay contained in the mortgage.

In *Guardian Depositors Corporation v. Brown*, 290 Mich. 433, 287 N.W. 798 (1939), the Court still further extended the rights of a mortgagee to collect a deficiency, this time by permitting a recovery in an action at law brought against a grantee who had assumed and agreed to pay the mortgage. While the right of a mortgagee as against a grantee to recover a deficiency decree in a

chancery proceeding had heretofore been recognized in Michigan, the *Brown case,* supra, recognized the same in an action at law by virtue of the operation of a new Michigan statute known as Act No. 296 Public Acts of 1937. See App. p. 19.

Finally, there is the decision of *Guardian Depositors Corporation v. Powers,* supra, in which the Supreme Court of Michigan recognized the four methods of recovery on behalf of the mortgagee, and which case, it is important to note, was in itself an action against an assuming grantee.

It is thus apparent that the Supreme Court of Michigan, among other remedies, has clearly recognized the right of a mortgagee to maintain an action for the collection of a deficiency based upon the covenant to pay contained in the mortgage, and this applies equally to both mortgagor and assuming grantee.

Perhaps the landmark case in Michigan relative to the liability of a grantee who assumes and agrees to pay a mortgage debt is *Crawford v. Edwards,* 33 Mich. 354 (1876). In this case, as in the instant suit, the mortgagor conveyed the mortgaged premises to the grantee by a deed containing a clause wherein the latter assumed and agreed to pay the mortgage debt and assumed the covenants in the mortgage. The Court in that case said:

> "The acceptance of such a deed binds the grantee as effectually as though the deed had been *inter partes* and had been executed by both grantor and grantee." (33 Mich. 354, 358.)

Further quoting with approval from a decision in another jurisdiction, the Supreme Court of Michigan said in *Crawford v. Edwards*:

> " 'The plain intent of the deed was to put the purchaser in the place of the vendor . . . , the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage as fully as if he himself had covenanted to pay it off. And either the vendor or mortgagee might, upon that contract, have compelled him to pay it off:' " (33 Mich. 354, 359-360.)

In Michigan, as elsewhere, ". . . no particular form of words is necessary for the creation of a covenant in a deed," *Vincent v. Crane*, 134 Mich. 700, 97 N.W. 34 (1903); "no particular form of phraseology is essential to constitute a covenant," *Mulligan v. Haggerty*, 296 Mich. 62, 295 N.W. 560 (1941).

It is true that Coyne did not sign or seal the deed which contains the mortgage assumption covenant, but the deed-poll containing the covenant was accepted by him, and the authorities hold that the acceptance of a deed-poll containing a covenant is the equivalent of formal execution:

> "As a general rule a grantee's acceptance of a deed containing a covenant on his part is equivalent to an agreement by him to perform the covenant." (21 C.J.S. *Covenants*, Sec. 8, p. 887.)

It is further significant to note that the Michigan statute of limitations (Sec. 13976 C.L. '29), supra, is different than the statutes found in many other states. The ten year provision, which petitioner contends is applicable herein, does not speak of covenants under

seal, but of "actions founded upon covenants in deeds and mortgages of real estate***." It seems clear that the within action is assuredly based upon the assumption of a covenant to pay contained in the mortgage and hence is an action founded upon covenant.

Petitioner, therefore, contends that it is apparent from this brief resume of the available Michigan decisions bearing upon the point at issue that in all probability the Michigan courts would decide that the respondent's liability herein sounded in covenant and not in simple contract. Added to this is also the fact that in petitioner's opinion the great weight of authority in other jurisdictions supports the views expressed herein. The numerous decisions of other Courts are set forth in the opinion of the Court of Appeals, and we shall not burden the Court with a repetition thereof herein (R. 46-47).

It is, therefore, respectfully submitted that the Writ of Certiorari should be granted.

ROBERT S. MARX
FRANK E. WOOD,
Attorneys for Petitioner

GEORGE P. BARSE,
Attorney for the Comptroller of the Currency
Of Counsel.

APPENDIX

Act No. 296, Pub. Acts 1937 (Comp. Laws Supp. 1937, Sections 14063-1 et seq., Stat. Ann. 1939 Cum. Supp. Sections 26.1231 et seq.).

Section 14063-1. PERSONS FOR WHOSE BENEFIT PROMISE IS MADE; RIGHT TO ENFORCE. Sec. 1. Any person for whose benefit a promise is made by way of contract, as hereinafter defined, shall have the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

Section 14063-2 SAME; DEFINITION. Sec. 2. A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or to refrain from doing something directly to or for said person.

Section 14063-3 SAME; VESTING OF RIGHTS; DIVESTURE. Sec. 3. The rights of a person for whose benefit a promise has been made, as hereinbefore defined, shall be deemed to have become vestd, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary: Provided, however, That if such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the said promise has not been discharged by agreement between the promisor and the

promiseee in the meantime: Provided further, That if the promisee is indebted or otherwise obligated to the person for whose beenfit the promise was made and the promise in question is intended when performed to discharge that debt or obligation, then the promisor and the promisee may, by mutual agreement, divest said person of his rights, provided this be done without intent to hinder, delay or defraud said person in the collection or enforcement of the said debt or other obligation which the promisee owes him and before he has taken any legal steps to enforce said promise made for his benefit.

Section 14063-4. RIGHTS OF PROMISE NOT IMPAIRED. Sec. 4. Nothing herein contained shall be held to abridge, impair or destroy the rights which the promisee of a promise made for the benefit of another person would otherwise have as a result of such promise.

Section 14063-5. RETROACTIVE OPERATION. Sec. 5. The provisions of this act shall be construed to be applicable to contracts made prior to its enactment as well as to those made subsequent thereto, unless such construction be held to be unconstitutional, in which case they shall be held to be applicable only to contracts made subsequent to its enactment.

CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 228

B. C. SCHRAM, Receiver of First National Bank-Detroit, a National Banking Association,

Petitioner,

vs.

JOSEPH L. COYNE

Respondent.

BRIEF FOR RESPONDENT

Appellant claims that the Circuit Court of Appeals erred in not referring this case to the state court for determination, and in affirming the decision of the District Court.

We contend that the decisions and statutes of the State of Michigan fully cover every point involved in this case.

While there is no Michigan decision on all fours with this case, both courts and both parties contended that the matter was determined by Michigan decisions and Michigan statutes. Where there is a four square decision on a question no further litigation arises, or at least should arise, involving it. Both of the lower courts were able to find in the Michigan decisions and statutes sufficient law to decide this case. As appellant stated in his Circuit Court of Appeals brief, "the Supreme Court of Michigan has

established certain fundamental principles which must be considered in determining the scope and effect of the limitations statute."

The appellant at no time prior to his petition for writ of certiorari has raised the point that the question was undecided by decisions of and not controlled by statutes of the State of Michigan by reason of which the Federal Court should have referred the case to the state court, and we believe it is too late to raise the point now.

> "It is not incumbent on the court to consider errors not assigned in the trial court, nor considered in the Circuit Court of Appeals, but first appearing in the petition for writ of certiorari." *Saltonstall vs. Birtwell,* 164 U. S. 54; 17 S. Ct. 19; 41 L. Ed. 348.
>
> "Supreme Court, on certiorari, would not discuss petitioner's contentions which he failed to assign as error in Circuit Court of Appeals." *Sonzinsky vs. U. S.,* 57 S. Ct. 554; 300 U. S. 506; 81 L. Ed. 772.
>
> "The Supreme Court has refused to consider a question which was not raised in the record; * * * and which was not considered by the court below." *Waterloo Distilling Corporation vs. U. S.,* 51 S. Ct. 282; 282 U. S. 577; 75 L. Ed. 558.
>
> "Supreme Court, in reviewing decision of Circuit Court of Appeals in revenue case on certiorari, will not determine issue not considered below." *Burnet vs. Commonwealth Improvement Co.,* 53 S. Ct. 198; 287 U. S. 415; 77 L. Ed. 1139.

As a matter of fact the appellant, in the lower courts, contended that the Federal court had jurisdiction and should decide the case. On page 10 of his Circuit Court of Appeals brief he said, "While no case decided by the Michigan courts has been found which passes upon the precise question involved here, well-settled principles of state law applied by the courts of Michigan lead to but one conclusion * * *," and cited the case of *Maryland Casualty*

Company vs. Cassetty et al, 119 F. (2d) 602, which held that (quoting from syllabus), "Where there were no state court decisions exactly in point on question of coverage of automobile liability policy, the Circuit Court of Appeals exercised its independent judgment in determining the law with respect to issues presented, based upon whatever principles of state law were applicable."

The following quotations from the opinion of the District Court (R. 34-38) show that the court relied upon the statutes and decisions of Michigan in arriving at its decision:

> "The only real question is whether the action is barred by the six or ten year limit placed upon actions by the statute of limitations of the State of Michigan (R. 34). * * *
>
> "Both parties rely upon Section 13976 C. L. 1929, being 27.605 Michigan Statutes Annotated, * * * (R. 35).
>
> "It is significant also that in the Savage case [*Guardian Depositors Corporation of Detroit vs. Savage*, 287 Mich. 193] reference is made by the court to Wisconsin law and upon reading the Wisconsin decision of *Bishop vs. Douglass*, 25 Wis. 696, we find a case on all fours with the present one (R. 36).
>
> "* * * it is undoubtedly the purpose of the Michigan statute and decisions to differentiate between the period during which action may be brought on a covenant under seal — extended by statute to ten years—and one where the contract is not under seal —a simple contract—where the statute of limitations runs for six years. (R. 37).
>
> "* * * Michigan seems to follow the special reasoning and great weight of authorities which indicate that an agreement by a grantee in a deed to assume an outstanding debt such as a mortgage by accepting a deed with a clause of assumption therein, is just a simple contract and not a special covenant such as

to extend the grantee's obligation to the statute of limitations' provision of ten years" (R. 38).

The fifth and main defense alleged in defendant's answer was based upon a Michigan statute; namely, the Michigan Statute of Limitations (R. 21). The sixth defense of the defendant was also based upon a Michigan statute, but both courts took the view that the defendant was entitled to a judgment on the basis of the limitations statute, so there was no necessity for considering the other defenses. The defendant also relied on Section 13281, Compiled Laws of 1929, 26.524 Annotated Statutes, which provides that no covenant shall be implied in any conveyance of real estate, and on Section 13282, Compiled Laws of 1929, 26.525 Annotated Statutes, which provides that no mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured.

While the Circuit Court of Appeals said that whether acceptance by a grantee of a deed from a mortgagor containing the grantee's assumption of the mortgage renders the grantee liable to the mortgagee on the covenant or a simple contract is a question that has not been decided by the Michigan courts, it proceeded to show that the basic principles involved were fully set forth in Michigan decisions and statutes and that by reason of these the grantee would not be liable on a covenant.

It relied upon the Michigan statute of limitations (R. 46). It said that a question involved was whether there was still a distinction between a contract and a covenant, and quoted from a recent Michigan case, *Guardian Depositors Corporation vs. Savage,* 287 Mich. 193, to show that the distinction is still observed in Michigan (R. 48). The appellant had relied and still does rely on the case of *Crawford vs. Edwards,* 33 Mich. 354, and the Circuit Court of Appeals points out why that case is not controlling (R. 48) and that the subsequent case of *Howe vs. Lemon,* 37

Mich. 164, dealt more closely with the general proposition involved (R. 50-1). It pointed out that Michigan decisions indicate that the distinction between covenants and simple contracts are closely adhered to in considering liabilities on foreclosure (R. 52).

It cited *Frank vs. Applebaum*, 270 Mich. 402, to show that the only covenant involved here was the covenant of the mortgagor and not that of the grantee (R. 52). It pointed out that cases that held the grantee liable as a covenantor hold that the acceptance of the deed is in the *nature* of a covenant; or that it is *equivalent* to a covenant; or that the grantee is liable as completely as though he had signed the agreement, whereas the cases that hold the liability of the grantee is one only of simple contract hold that the fundamental requisite of a covenant is that it be signed and sealed (R. 53). (Italics ours.) The court had cited the Michigan case of *Guardian Depositors Corporation vs. Savage*, 287 Mich. 193, to show that in Michigan a covenant must be signed and sealed (R. 48), and cited Michigan statutes that held covenants could not be implied in deeds or mortgages in Michigan (R. 51, 54).

We therefore respectfully submit that there are applicable Michigan statutes and controlling Michigan decisions covering the point raised and that the lower courts should not have referred the question for decision to the state courts of Michigan, especially since the appellant did not make such a request or raise this issue in the lower courts.

UNDER MICHIGAN DECISIONS AND STATUTES AN ACTION TO COLLECT A MORTGAGE DEFICIENCY FROM THE MORTGAGOR'S GRANTEE WHO ASSUMED AND AGREED TO PAY THE MORTGAGE MUST BE BROUGHT WITHIN SIX YEARS.

The two opinions of the lower courts show that under Michigan decisions and statutes an action at law to collect a deficiency from a grantee who assumed the mortgage must be brought within six years. The two courts analyzed and discussed all of the cases being relied upon by the appellant and told why they were not applicable or controlling.

Under the Michigan statute of limitations all actions must be brought within six years *except* actions founded upon covenants in deeds and mortgages, which may be brought within ten years. Appellant did not bring this action within six years, so he is trying to bring his case within the *exception* to the general six-year limitation.

His action is against Coyne, so he must show that Coyne made a covenant. Coyne neither signed nor sealed any instrument involved (R. 23).

Michigan still recognizes the distinction between an ordinary contract and a covenant.

> "Always a covenant obligation has been considered more solemn and binding than a mere promise in writing *not under seal.*" (Italics ours.) *Guardian Depositors Corporation v. Savage,* 287 Mich. 193.

As pointed out in the decision of the District Court, "Close analysis of the Savage case (supra), however—incidentally a four to three decision — clearly indicates that the entire court continuously had in mind the distinction between liability on the note as such — a simple contract — and liability on the mortgage as such — a special covenant" (R. 36).

At least two different Michigan statutes show that the distinction is clearly kept in mind. It is provided in Section 13281, Compiled Laws of 1929, 26.524 Annotated Statutes, that "no covenant shall be implied in any conveyance of real estate, except oil and gas leases, whether such conveyance contains special covenants or not." This recognizes that a conveyance of real estate may contain both general contracts and covenants. The fact that an agreement is in a deed does not mean that it is a covenant, at least in Michigan.

It is also provided in Section 13282, Compiled Laws of 1929, 26.525 Annotated Statutes, that "no mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured". In other words, in order to claim that a defendant covenants to pay a mortgage debt, there must be an *express covenant* to pay. An implied covenant is not sufficient.

The appellant still puts great stress upon the case of *Crawford vs. Edwards,* 33 Mich. 354. We contend that it is not at all in point because it simply held, as practically all cases from practically all states do, that the acceptance by a grantee of a deed which recites that the grantee assumes and agrees to pay a mortgage makes the grantee liable for the payment. It does not hold that the grantee thereby becomes the covenantor. The quotation on page 17 of petitioner's brief is not from the court's opinion but from a case cited therein. The question of covenants was not involved in the Crawford case, but it was involved in the case of *Howe vs. Lemon,* 37 Mich. 164. The Crawford opinion was rendered in 1876 by Judge Marston, and the other justices were Cooley, Campbell, Graves, and Smith. The Howe case opinion was rendered the following year, 1877, by Chief Justice Cooley, and the other justices were Campbell, Marston, and Graves, and all concurred. In this later case the court said that the agreement to deed to

Mrs. Lemon, the grantee, "Purports to make Mary Jane Lemon covenant for the repayment * * * . It is not, however, signed by her * * * . If she can be held liable it must be on the ground that by accepting the agreement for conveyance of the land to her, she, by implication promised to pay the amount. But it is provided by statute that 'no mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured' which we think is decisive here, the transaction being conceded to be a mortgage".

That statute is still in effect in Michigan as is the statute providing that "no covenant shall be implied in any conveyance of real estate, except oil and gas leases, whether such conveyance contains special covenants or not".

Michigan clearly requires that a covenant be signed and sealed. In *Johnson vs. Hollensworth,* 48 Mich. 140, involving the question of what constituted a covenant, the court said, "There is no fixed or essential form for any covenant; a covenant is merely a promise *under seal.*" (Italics ours). We have previously referred to the Savage case which states that a covenant is a promise in writing under seal. In *Vincent vs. Crane,* 134 Mich. 700, the court said that no particular form of words is necessary to create a covenant in a deed, but it was enough that it was under seal. The court said, "This is an agreement under seal", showing that a seal is deemed essential. The lease involved in that case was signed and sealed by both parties and did contain the word "covenant".

There are at least two United States Supreme Court decisions clearly in point. In the case of *Hale vs. Finch,* 104 U. S. 261, the court held that since the preceding agreement did contain words of covenant and the second one did not, the parties would be assumed to know the distinction and that the second agreement did not constitute a

covenant, so the court said it did not need to consider "whether a covenant upon the part of Finch could arise out of a bill of sale he did not sign, but merely accepted from his vendor". This case involved the sale of a boat.

This case is similar to our own inasmuch as the first instrument, the mortgage, did contain words of covenant and the second instrument, the deed, did not, so far as the grantee was concerned. The deed contained covenants on the part of the grantor and used the word "covenant", (R. 12) but in the assumption clause on which petitioner relies the word "agrees" was used but not the word "covenant".

In the case of *Willard vs. Wood*, 164 U. S. 502, the Supreme Court held that in the District of Columbia the liability of a person by reason of his accepting a conveyance of real estate, subject to a mortgage which he is to assume and pay, is subject to the limitation prescribed as to simple contracts.

Outside of the two above cited United States Supreme Court cases, we have cited in this brief only Michigan decisions and they clearly show that:

1. Michigan still makes a distinction between contracts and covenants,

2. Covenants must be signed and sealed,

3. Covenants cannot be implied in deeds or mortgages, especially a covenant to pay a mortgage debt, and

4. Actions, except on covenants, must be brought within six years.

The appellant is seeking to recover from Coyne upon the ground that he accepted a deed that recited that the premises conveyed were subject to a mortgage "which party of the second part (Coyne) assumes and agrees to pay ac-

cording to its terms and stipulations". (R. 12). The assumption clause does not say that Coyne *covenants* to pay but only that he *agrees* to pay. He did not sign or seal the instrument.

Undoubtedly, a grantee could be made liable over a ten-year period rather than a six-year period by inserting in the deed that he assumes, *covenants,* and agrees to pay the mortgage and then signs and seals the deed thereby making it an indenture rather than a deed poll. Since that was not done in our case, the defendant Coyne can be held only as a contractor and not as a covenantor. There is certainly a distinction between an *agreement* to perform a covenant and a *covenant* to perform a covenant. The only disadvantage that the petitioner in this case has suffered is that he was required to bring this action within six years after the date on which the last payment was made on the mortgage. That is not an unreasonable requirement, and we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

HARRY C. BULKLEY,
GLENN D. CURTIS,
Attorneys for Respondent.

BULKLEY, DICKINSON, WRIGHT & DAVIS,
Of Counsel,
3000 Union Guardian Building,
Detroit, Michigan.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

B. C. SCHRAM, Receiver of First National Bank-Detroit, a National Banking Association, Petitioner,

vs.

JOSEPH L. COYNE, Respondent.

No. 228

REPLY BRIEF OF PETITIONER

ROBERT S. MARX,
FRANK E. WOOD,
Attorneys for Petitioner.

JOHN F. ANDERSON,
Chief Counsel for the
Comptroller of the Currency
Of Counsel.

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No. 228

REPLY BRIEF OF PETITIONER

Respondent's brief is divided into two portions. The first section is devoted to the argument that the Receiver's petition for a writ of certiorari should be denied, because one of the grounds alleged therefor raises a point not previously presented in this case. The second portion of respondent's brief argues the merits of the case, claiming that respondent's position is sustained by the Michigan authorities. This latter point has heretofore been discussed both in our petition and brief and we shall not argue the same further herein (pp. 5, 13-18).

With reference to the first contention, respondent argues that we are untimely in asking this court to remand this case to the District Court with instructions to refer the single question of substantive law involved to the state courts of Michigan for determination, because our initial request for such relief appears in our petition for certiorari. It is further contended by the respondent that counsel for both parties as well as both of the lower courts, encountered no difficulty in finding applicable Michigan decisions.

While the briefs filed in the lower courts are not before this Court, there can be no doubt that counsel for both petitioner and respondent took the position in both the District Court and the Court of Appeals that the single substantive question of law presented herein was governed by Michigan authorities. Counsel for the petitioner contended that the contract liability of one who accepted a deed of conveyance in Michigan in which he assumed and agreed to pay an outstanding mortgage against the property transferred was in the nature of a covenant. Counsel for the respondent took the position that that liability was in the nature of a simple contract. True it is also, that the District Court, at least inferentially, held that such liability under Michigan authorities was in the nature of simple contract.

However, in unmistakably clear and lucid language heretofore quoted in our petition and brief filed herein (pp. 9-10) the Court of Appeals differed with both the District Court and counsel for both sides and specifically held that the substantive question of law involved in this case was open and undecided in Michigan. In said court's opinion, the general weight of authority of other state court decisions pointed in the direction of constituting such liability in the nature of simple contract rather than covenant, and hence the Court of Appeals affirmed the lower court.

It is obvious, therefore, that petitioner could not have made his request for a reference to the state courts prior to the filing of his petition for a writ of certiorari herein, because the Court of Appeals in its opinion for the first time held that this question of law was open and undecided by the courts of Michigan.

Therefore, neither the arguments nor the authorities recited in respondent's brief are applicable. We do not differ with the point of view expressed by counsel for respondent that the substantive question of law involved herein has been decided by Michigan courts. As a matter of fact, in our petition and brief filed in this Court we have argued that the Michigan authorities establish that the liability of the respondent herein is in the nature of a covenant, while counsel for the respondent has similarly argued in his brief that his liability under the Michigan decisions is clearly established as that of simple contract. It is with the Court of Appeals decision that we differ, and it is because of that decision that we ask this Court to refer the substantive question of law to the state courts for final determination.

To summarize briefly, throughout this case counsel for petitioner and respondent have contended that the substantive law involved is governed by Michigan authorities, although they have reached different conclusions as to what those authorities hold. However, in clear and unambiguous language, the Court of Appeals has held that there is no Michigan authority on the point involved.

Respectfully submitted,

ROBERT S. MARX,
FRANK E. WOOD,
Attorneys for Petitioner.

JOHN F. ANDERSON,
Chief Counsel for the
Comptroller of the Currency
Of Counsel.